Supreme Court, U.S.
FILED

No. 03 914 DEC 22 2003

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IN THE

Supreme Court of the United States

DELAWARE AND HUDSON RAILWAY COMPANY, INC., d/b/a CP Rail System,

Petitioner,

v.

WILLIAM S. MIX,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An action under the Federal Employees' Liability Act, 45 U.S.C. §§ 51, *et seq.*, ("FELA") may not be maintained unless it is commenced within three years from the day the cause of action accrued. Plaintiff, William S. Mix, ("Plaintiff") commenced this action, which alleged a hearing loss, more than three years after he knew, or should have known, of the existence of his injury and its cause. The question presented is this:

May a plaintiff recover under FELA for injuries allegedly suffered during the three-year period prior to commencement of the action even where it is found that the plaintiff knew, or should have known, of the existence of his injury and its cause prior to the three-year period?

LIST OF PARTIES AND RULE 29.6 LIST

The parties in the court of appeals were William S. Mix, respondent herein, and Delaware and Hudson Railway Company, Inc., doing business as CP Rail System, petitioner herein.

Canadian Pacific Railway Company is the parent company of Delaware and Hudson Railway Company, Inc., and owns a 100% interest in Delaware and Hudson Railway Company, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit") affirming and vacating in part summary judgment for Delaware and Hudson Railway Company, Inc. ("D&H"), and remanding to the court below is reported at 345 F.3d 82 (2d Cir. 2003) and is reprinted in the appendix hereto ("Pet. App.") at 1a. The opinion of the district court granting summary judgment for D&H is not reported, but is reprinted here at Pet. App. 18a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on September 23, 2003 (Pet. App. 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provision in this case is Section 56 of FELA which provides as follows: "[n]o action shall be maintained under this act unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56.

STATEMENT OF THE CASE

Plaintiff was employed by D&H from September 1973 until April 2000 initially as a laborer and thereafter as a locomotive engineer. Plaintiff commenced this action on June 28, 2000, in the United States District Court for the Northern District of New York, pursuant to 45 U.S.C. § 56, alleging that he suffered a noise induced occupational hearing loss caused by D&H's alleged failure to provide him with a

reasonably safe place to work. D&H filed an answer on September 8, 2000, denying the essential allegations of the complaint and raising several affirmative defenses, including a defense that Plaintiff's claim is barred by the applicable statute of limitations.

After discovery was completed, D&H moved for summary judgment requesting dismissal of the complaint on the ground that Plaintiff's claims were barred by the three-year statute of limitations set forth in 45 U.S.C. § 56. The evidence in the record established, and both the district court and the Second Circuit found, that Plaintiff knew, or should have known, of his injury and its cause as early as November 1993, well beyond three years prior to the date when this action was commenced in June 2000. Pet. App. 6a; 27a; 30a; 31a-32a.

By Memorandum-Decision and Order dated and filed September 12, 2002, the district court granted the motion of D&H and dismissed the complaint. Pet. App. 35a.

Plaintiff appealed to the Second Circuit and, by order dated September 23, 2003, that court affirmed in part, vacated in part, and remanded the case to the district court. Pet. App. 1a; 17a.

REASONS FOR GRANTING THE PETITION

This Court and all circuits previously addressing this issue have held that an FELA claim accrues when the plaintiff knew, or should have known, of the existence of the injury and its cause. An action under the FELA is barred unless commenced within three years from the day that the cause of action accrued. 45 U.S.C. § 56. This Court and several circuits

interpreting § 56 have unanimously held that a plaintiff cannot maintain a claim under the FELA for injuries allegedly sustained before or during the three-year period before the commencement of the action if the plaintiff knew, or should have known, of the existence of the injury and its cause more than three years before the commencement of the action.

The Second Circuit acknowledged this rule in its decision but adopted an exception contrary to the holdings of this Court and at least six other circuit courts. Pet. App. 10a. The Second Circuit created an exception to the "discovery rule" in its holding which permits, in given circumstances, a plaintiff to maintain an action for injuries allegedly sustained during the three-year period prior to commencement of the action, notwithstanding the fact that the FELA claim accrued more than three years before the commencement of the action.

This Court has recognized that uniform application of FELA throughout the nation is essential to effectuate the purposes of the statute. *See Dice v Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) (holding that federal law controls over state law in FELA cases). The need for uniform application of FELA is of particular importance to railroads such as D&H. Railroads do not simply exist in a single discrete location but, by their very nature of their existence, require continuous movement throughout the nation. Many railroad employees, as part of their job duties, travel continuously across circuit lines. Indeed, a plaintiff with an alleged gradual injury may suffer that injury across numerous circuits throughout the time of his or her employment. It does not further the goal of uniform application of FELA for the calculation of the statute of

limitations period and the resolution of a particular action to be dependent on the circuit in which the plaintiff commences the action.

I. Timeliness of Claims Under FELA

Section 56 of FELA provides, in pertinent part, "[n]o action shall be maintained under this act unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. In most cases, the date of accrual is easily determined. When an injury is sustained in a discreet traumatic incident, the cause of action accrues on the date of the injury, provided the employee is aware of the traumatic injury and the trauma causing the injury. Plaintiff's complaint does not allege any specific date of injury, but alleges that he was exposed to loud noises throughout his employment with D&H.

This Court has held that, when the specific date of injury cannot be determined because the injury results from an exposure over the course of time, a plaintiff's cause of action under FELA accrues when the injury manifests itself. *Urie v. Thomson*, 337 U.S. 163, 170 (1949). This Court held:

> [i]t follows that no specific date of contact with the substance can be charged with being the date of injury inasmuch as the injurious consequences of the exposure are the product of a period of time rather than appointive time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifests themselves. (Citation omitted.)

Id. This Court further refined the *Urie* rule in *United States v. Kubrick*, 444 U.S. 111 (1979), an action brought pursuant to the Federal Tort Claims Act, holding that the cause of action accrued when the plaintiff had the critical facts in his possession of both the injury and the governing cause of that injury even though he was unaware that a legal wrong had occurred. *Id.*, at 120 n.7, 122.

The Second Circuit has followed this discovery rule holding that a claim accrues ". . . when the plaintiff in the exercise of reasonable diligence knows both of the existence and the cause of his injury." *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080 (2d Cir. 1988) (*citing Kubrick*, 444 U.S. at 122-25). This same discovery rule has consistently been held to apply to actions brought pursuant to FELA. *See Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990); *Albert v. Maine Cent. Ry. Co.*, 905 F.2d 541, 544 (1st Cir. 1990); *Townley v. Norfolk & Western Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989); *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3d Cir. 1986).

The discovery rule imposes an affirmative duty on an injured plaintiff to investigate the facts of the injury and its cause once the injured individual has been alerted to the symptoms of the injury. *Tolston v. National R.R. Passenger Corp.*, 102 F.3d 863, 865 (7th Cir. 1996); *Fries*, 909 F.2d at 1095; *Nemmers v. United States*, 795 F.2d 628, 629 (7th Cir. 1986); *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 820-21 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987). The Seventh Circuit observed:

> [w]hat the *Urie* court did not do was provide an escape for plaintiffs who are aware that some type of injury exists yet who choose to ignore by failing

> to seek diagnosis and investigate the cause. *Kubrick*, 444 U.S. at 120-21 n.7, 100 S. Ct. at 358-59 n.7. The tolling permitted by *Urie* only extends the limitation period to the date when the injury manifests itself, not beyond.

Fries, 909 F.2d at 1095.

The components of the discovery rule require:

> . . . an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause (citations omitted). Moreover, the injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need to know or have reason to know of a potential cause.

Fries, 909 F.2d at 1095.

A plaintiff need not have actual knowledge of the specific cause of the injury. "At some point, persons with degenerative conditions have a duty to investigate cause." *Tolston*, 102 F.3d at 866. The Seventh Circuit has held that:

> [i]n order to establish causation, it is not necessary for the injured plaintiff to be certain which cause, if many are possible, is the primary cause. The plaintiff is required to only need to know, or have reason to know, of a potential cause in order for the cause of action to accrue.

Fries, 909 F.2d at 1095.

The *Fries* case is directly on point. There, the plaintiff commenced an FELA action on November 18, 1987, for hearing loss and tinnitus. The plaintiff testified during his deposition that he first began to notice a decline in his hearing in 1980 or 1981 and first noticed ringing in his ears in either 1981 or 1982. *Id.* at 1093. The plaintiff did not seek any medical treatment for his hearing loss until 1985 and was not diagnosed by a physician with a hearing loss until May 1985, within three years of the commencement of the action. *Id.* at 1094. The Seventh Circuit dismissed the plaintiff's complaint and granted summary judgment in favor of the defendant on statute of limitations grounds, rejecting the plaintiff's argument that the statute of limitations was tolled until 1985 when the plaintiff was actually diagnosed with hearing loss due to the cumulative nature of the injury. The court held that actual knowledge of a diagnosis or causation was unnecessary under the *Urie* and *Kubrick* holdings. The court reasoned that the FELA claim accrued when in 1981 when the plaintiff knew, or should have known, of an injury and its possible connection with his employment. *Id.* at 1094-96.

The First Circuit was faced with a similar situation in *Albert* and, consistent with *Fries*, held:

> [o]nce each appellant reached the conclusion that he believed he had a hearing loss and that he believed he had a hearing loss and that he believed that the injury was caused by his employment, we find that he had a duty to investigate the situation in order to confirm or deny his belief. This is especially true here where the appellants thought they knew the cause of their injury. To hold

> otherwise would essentially render the FELA statute of limitations meaningless.

905 F.2d at 544.

The Fourth, Fifth, Sixth, Tenth and Eleventh Circuits have followed the same analysis as that of the First and Seventh Circuits. *See Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1236 (10th Cir. 2001); *Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 582 (6th Cir. 2000); *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1432-33 (11th Cir. 1997) (interpreting a similar provision of the maritime law, 46 U.S.C.App. § 763a); *Aparico v. Norfolk & Western Ry. Co.*, 84 F.3d 803, 815 (6th Cir. 1996); *Bealer v. Missouri Pacific R.R. Co.*, 951 F.2d 38, 39-40 (5th Cir. 1991); *Townley v. Norfolk & W. Ry. Co.*, 887 F.2d at 501 (4th Cir. 1989).

II. Application of the Discovery Rule to the Instant Case

In its decision, the Second Circuit separately considered the injuries allegedly suffered by Plaintiff prior to June 28, 1997, and those allegedly suffered between June 28, 1997, and June 28, 2000.

A. Injuries Prior to June 28, 1997

Plaintiff commenced this action on June 28, 2000. The Court of Appeals agreed with D&H and the District Court that "[t]he undisputed facts establish that [Plaintiff] knew, or should have known, of the existence of his injury prior to [June 28, 1997]." Pet. App. 6a. As a result, the Court of Appeals agreed with D&H that Plaintiff is barred from recovering for any injuries prior to June 28, 1997, and,

accordingly, it affirmed so much of district court's decision as granted summary judgment dismissing Plaintiff's claim as it seeks to recover for injuries prior to the date.

B. Injuries Between June 28, 1997 and June 28, 2000

In considering Plaintiff's claim for injuries between June 28, 1997, and June 28, 2000, the Court of Appeals acknowledged that it declined to follow the First, Fourth, Fifth, Seventh, Tenth and Eleventh Circuits, Pet. App. 10a, which, as discussed above, have held that a plaintiff who knew, or should have known, of his injury and its cause prior to the three-year limitation period is barred from seeking to recover for injuries suffered *both before and during* the three-year statutory period. The Second Circuit expressly stated "...we decline to join the following circuit decisions to the extent that they can be read as necessarily barring FELA claims based upon injuries suffered during the three-year period of limitations." Pet. App. 10a.

Initially, the Court of Appeals agreed with D&H and rejected Plaintiff's contention that the statute of limitations should be tolled due to the "continuing tort doctrine." Pet. App. 11a-13a.

Next, the Court of Appeals also agreed with D&H and rejected Plaintiff's contention that he should be permitted a distinct cause of action for aggravation of an existing gradual injury. Pet. App. 13a-14a.

The Second Circuit went on, however, to create an exception to the "discovery rule" whereby it permitted Plaintiff to recover for injuries allegedly suffered during the three-year period prior to commencement of the action

notwithstanding the fact that the cause of action accrued prior to that period. The court permitted recovery if Plaintiff can demonstrate that the injury prior to the three-year period was merely temporary and that the injury thereafter manifested itself as a cumulative, permanent injury during the three-year period. Pet. App. 15a-16a.[1]

In the instant case, the record contains no evidence that the Plaintiff's injury was temporary and later became permanent during the three-year period prior to commencement of this action, nor did Plaintiff ever make such an argument. The record was to the contrary. It was undisputed that Plaintiff consulted an otolaryngologist for ringing in his ears and reduced hearing in November 1993, more than six years before the action was commenced. Pet. App. 2a-3a. Additionally, in August 1994, Plaintiff completed a medical questionnaire and stated that he was hard of hearing and had "constant" ringing in his ears. Pet. App. 3a. The Second Circuit recognized that "tinnitus" and "hearing loss" were not separate conditions. Pet. App. 14a. Moreover, the Second Circuit essentially acknowledged that Plaintiff offered no evidence that his injury was initially temporary and later became permanent. Pet. App. 16a. Yet, the Second Circuit remanded the matter to the District Court for fact finding on this issue. Pet. App. 16a-17a.

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1. The Second Circuit also held that a FELA plaintiff may assert a claim for aggravation of an existing injury where the evidence shows that the additional damage was caused by a distinct act of negligence of which the plaintiff only became aware during the three-year period proceeding the suit. Pet. App. 16a. The Second Circuit went on, however, to hold that Plaintiff in the instant case never claimed that his alleged hearing loss stemmed from two distinct causes. Pet. App. 17a. Accordingly, the Second Circuit did not remand on this issue.

By simply referring to the change from a temporary to a permanent injury as "cumulative" instead of "aggravation," the Second Circuit has created an exception to the long established principal that there is no distinct cause of action for aggravation of an existing gradual injury. Indeed, as mentioned above, the Second Circuit expressly rejected Plaintiff's contention that he should be permitted a distinct cause of action for an aggravation of the prior injury because such a claim would contravene this Court's holdings in *Urie* and *Kubrick*:

> [w]e reject this approach, to the extent the claim for aggravation is based on negligence which the plaintiff was aware over three years before this suit. Were we to allow such a claim for aggravation, a plaintiff could recover for an injury whose existence and cause was known over three years preceding this suit, in contravention of the Supreme Court's holdings in *Urie v Thompson*, 337 U.S. 163, 170 (149) and *United States v Kubrick* , 444 US 111, 122-125 (1979).

Pet. App. 13a-14a. The Second Circuit's hairsplitting distinction between "aggravation" and "accumulation" violates the fundamental principles of the discovery rule enunciated by this Court in *Urie* and *Kubrick* and renders the FELA statute of limitations meaningless.

Permitting Plaintiff to maintain a claim for accumulation of a prior temporary injury into a permanent injury is, in essence, the same as permitting a distinct claim for aggravation of a prior injury. In the same way that permitting a cause of action for aggravation of a prior injury would contravene this Court's holdings in *Urie* and *Kubrick*, so too

would permitting a cause of action for accumulation of an allegedly temporary injury to a permanent injury. From a practical standpoint, permitting a distinct claim for accumulation of a temporary injury into a permanent injury is simply an open door to any plaintiff to claim that his or her injuries prior to the three-year period were merely temporary but became permanent during that period, thus avoiding the statute of limitations bar.

The Second Circuit's decision is at odds with the decisions of other circuits. In *Fries*, as explained above, the plaintiff claimed to suffer a gradual hearing loss as does the Plaintiff herein. The hearing loss was initially temporary and later became permanent. 909 F.2d at 1094, 1095. The Seventh Circuit rejected the very same "accumulation" principle adopted by the Second Circuit herein. *Id.* at 1095-96. The Seventh Circuit noted "[t]hat defendant's injury had not reached its maximum severity in 1981 but continued to progress does not affect the result." *Id.* at 1096.

In *Bealer*, the Fifth Circuit similarly rejected the plaintiff's claim that his hearing loss only later became permanent and that the statute of limitations should run from that time. 951 F.2d at 39-40.

In making its ruling, the Second Circuit claimed to rely on the Sixth Circuit's decision in *Fonseca v Consolidated Rail Corp*, 246 F.3d 585 (6th Cir. 2001). Pet. App 15a. In that case, however, the plaintiff did not suffer an aggravation of a prior injury. Rather, the evidence showed that the earlier injury was temporary pain in his hands which always subsided the next day and the later injury was persistent pain. The Sixth Circuit in *Fonseca* expressly stated that it agreed with prevailing law in the other circuits that a

plaintiff does not have a distinct cause of action for aggravation of a prior injury. *Id.* at 589-90. The *Fonseca* court denied summary judgment to the defendant on the ground that there was a question of fact as to whether the plaintiff had sustained a separate and distinct injury within the three years before the commencement of the action. *Id.* at 590-91. The *Fonseca* holding is consistent with *Urie*, *Kubrick*, and the decisions of other circuit courts and does not support the exception created by the Second Circuit in this case. The Second Circuit in this case created an exception for recovery of an aggravation or "accumulation" and without any evidence establishing a separate and distinct injury. Pet. App. 15a-16a. *Fonseca* is clearly distinguishable from the instant case in that the plaintiff in *Fonseca* offered evidence that there was a separate and distinct injury during the three-year period prior to commencement of the action. *Id.* at 590-591.

Despite the *Fonseca* holding, the Sixth Circuit fully agrees with the other circuits that there is no distinct cause of action for aggravation of a prior injury. This is shown by its holding in two other cases. In *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d at 815, the Sixth Circuit held:

> [a]ny aggravation of the original negligently caused injury would only affect the plaintiff's damages, and would not require a separate determination of liability or causation. Furthermore, a rule permitting severability of a claim that an original, continuing injury has been aggravated would contravene the purpose of the discovery rule articulated in *Urie* requiring Federal Employers' Liability Act

> plaintiffs to use reasonable diligence to discover the cause of an injury once the injury manifests itself.

Id. at 815.

The Sixth Circuit reaffirmed its holding in *Aparicio* in *Mounts v. Grand Trunk Western R.R.*, 198 F.3d at 582, a case strikingly similar to the instant case. There, as here, the plaintiff suffered a gradual hearing loss which eventually worsened to a permanent hearing loss. *Id.* at 579-80. As in the instant case, the plaintiff in *Mounts* offered no "evidence that a separate injury or disease occurred within the three-year statute of limitations." *Id.* at 582. The Sixth Circuit held that the plaintiff had no cause of action for aggravation of his initial injury and expressly held that the plaintiff offered no evidence that his later injury was distinct from his prior injury. *Id.* at 582.

The decision of the Second Circuit is not only at odds with this Court's decisions in *Urie* and *Kubrick*, but it is contrary to decisions and reasoning of the First, Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits. The Second Circuit has permitted a claim for injury during the three-year period prior to the commencement of the action to stand when plaintiff knew of the injury and its cause at least six years before the commencement of this action. Such an exception is without support in any decision of this Court or the other circuits throughout the country. This inconsistency in interpretation of FELA warrants review by this Court. *See Dice v Canton & Youngstown R.R.*, 342 U.S. at 361.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari Delaware and Hudson Railway Corp., Inc. d/b/a CP Rail should be granted.

Respectfully submitted,

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